

BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE

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SECRETARY OF STATE

IN THE MATTER OF:

BRIAN KING ROOFING, INC.

and

HARTFORD UNDERWRITERS
INSURANCE COMPANY

Doc. No.: 12.28-118415A
WC Appeal – Insurance

FINAL ORDER

This matter was heard on March 24, 2014 before the Honorable Joyce Carter Ball, Administrative Law Judge, appointed by the Secretary of State, with Maliaka Bass, Chief Counsel for Consumer Affairs and Administration of the Tennessee Department of Commerce and Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. As the Commissioner's Designee, Ms. Bass makes the final determination as to the findings of fact and conclusions of law in this matter. The Petitioner, Brian King Roofing, Inc. ("Brian King Roofing"), was represented by Attorney Adam G. Russell. The Respondent, Hartford Underwriters Insurance Company ("Hartford"), was represented by Attorney Ben Rose.

JURISDICTION

The Commissioner of Commerce and Insurance ("Commissioner") has jurisdiction in this matter pursuant to Tenn. Code Ann. § 56-5-309(b), which provides:

Every insurer and rate service organization shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard on written request to review the matter in which the rating system has been applied in conjunction with the insurance afforded. If the insurer fails to grant or reject the request within thirty (30) days, the applicant may proceed in the same manner as if the application had been rejected. Any party affected by an action of the insurer on the request may, within thirty (30) days after written notice of the action, appeal to the commissioner who, after a hearing held upon not less than ten (10) days' written notice to the appellant and to the insurer, may affirm, modify, or reverse the action.

ISSUES

The subject of this hearing was whether Hartford is owed additional premium based on the potential liability of Hartford due to individuals who were engaged by Brian King Roofing to perform roofing services and who were not covered under any other workers' compensation plan. Brian King Roofing asserts that it should not owe additional premium due because these individuals were subcontractors employed by a third party, Raymond Hatcher. Brian King Roofing believes it made reasonable inquiries into whether Raymond Hatcher had current workers' compensation insurance and relied upon a certificate of coverage that was later determined to be fraudulent. Hartford asserts that the roofers engaged by Brian King Roofing, while not covered by a bona fide workers' compensation plan, placed the insurer at greater risk for which it is owed additional premium.

Upon consideration of the record, it is determined that Hartford did bear additional risk because the workers engaged by Brian King Roofing were not covered by any other workers' compensation plan and, accordingly, Brian King Roofing owes additional premium to Hartford in the amount of forty four thousand eight hundred and fifteen dollars (\$44,815).

This decision is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Brian King Roofing, Inc. is a Tennessee Corporation engaged in the business of providing roofing services. Its principal offices are located in Seymour, Tennessee. This corporation is owned and controlled by Jackie Brian King of Seymour, Tennessee.
2. The Tennessee Workers' Compensation Insurance Plan ("TWCIP") is a statutory workers' compensation insurance plan to provide coverage for employers unable to obtain such coverage through the voluntary market, the market of last resort for workers' compensation insurance in Tennessee.

3. Hartford Underwriters Insurance Company is an insurance company licensed to sell workers' compensation insurance coverage in Tennessee and was at all relevant times the insurer for the workers' compensation insurance coverage issued to Brian King Roofing through the TWCIP. Administrative services (underwriting, policy issuance, auditing, and accounting services) for this coverage were provided by Travelers Indemnity Company ("Travelers").

4. Raymond Hatcher ("Mr. Hatcher") is a roofer engaged by Brian King Roofing to perform roofing services. At all times material hereto, Mr. Hatcher made available to Brian King Roofing approximately five or six helpers who performed roofing work at the ultimate direction and control of Brian King Roofing.

5. Brian King Roofing obtained a workers' compensation insurance policy from Hartford that provided coverage from June 14, 2011 to June 14, 2012.

6. This policy contained the following provisions, in pertinent part:

Our Manuals

All premiums for this policy will be determined by our manuals of rules, rates, rating plans and classifications.¹ We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

Classifications

Item 4 of the Information Page shows the rate and premium basis for certain businesses or classifications. These classifications were assigned based on an estimate of the exposures you should have during the policy period. If your actual exposures are not properly described by these classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

Remuneration

¹ Pursuant to Tenn. Code Ann. § 56-5-320, the National Council for Compensation Insurance ("NCCP"), is the rate service organization that develops rules and classifications for workers' compensation insurance on behalf of its members. American Zurich Insurance Company v. MVT Services, Inc., 2012 WL 3064650 (Tenn. Ct. App. July 27, 2012) at *2. See also, Travelers Indemnity Company v. International Nutrition, Inc., 734 N.W.2d 719, 722 (Neb.2007).

Premium of each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. All your officers and employees engaged in work covered by this policy; and
2. All other persons engaged in work that could make us liable under Part One (Workers' Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as a premium basis. This Paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers' compensation obligations.

Premium Payments

You will pay all premium when due. You will pay the premium even if part or all of a workers' compensation law is not valid.

Final Premium

The premium shown on the Information Page, schedules and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications, and rates, that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy. . .

Records

You will keep records of information needed to compute the premium. You will provide us with copies of those records when we ask for them.

Audit

You will let us examine and audit all of your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the

audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

7. During the policy year, a widespread hail storm struck the area where Brian King Roofing operated, resulting in a substantial increase in roofing work for Brian King Roofing.

8. To meet this increased need for roofing services, Brian King Roofing engaged the services of additional roofers, including Mr. Hatcher and five or six individuals he engaged.

9. Mr. Hatcher, and the individuals engaged to assist him, performed roofing work at the direction of Brian King Roofing, performed services to the standards and expectations of Brian King Roofing, utilized materials provided by Brian King Roofing, and worked alongside other Brian King Roofing employees and subcontractors.

10. Mr. Hatcher was paid weekly, based on the amount of work (by the square foot) performed by himself and the other individuals he engaged.

11. Brian King Roofing did not enter into any formal written contract with Mr. Hatcher for his services, or for those of the other individuals Mr. Hatcher engaged.

12. Brian King Roofing provided Mr. Hatcher with tools and equipment as needed.

13. Brian King Roofing retained the right to fire individual workers, including Mr. Hatcher or any of the individuals engaged by Mr. Hatcher, for failing to perform up to the standards established by Brian King Roofing.

14. Brian King Roofing documented the compensation paid to Mr. Hatcher on a W-9 form.

15. When he was engaged by Brian King Roofing, Mr. Hatcher produced a document captioned "Certificate of Insurance" which indicated that Mr. Hatcher, and the individuals he engaged, were covered under a workers' compensation insurance policy.

16. In his testimony, Brian King Roofing, the Petitioner, stated that he relied solely on the Certificate of Insurance provided by Mr. Hatcher to ascertain whether Mr. Hatcher and the individuals engaged by Mr. Hatcher were covered under a workers' compensation policy. Brian King Roofing took no steps that would have independently verified the veracity of the document produced by Mr. Hatcher.

17. After the expiration of this policy, Travelers conducted an audit Brian King Roofing on behalf of Hartford.

18. In the course of the audit, it was revealed that the Certificate of Insurance provided by Mr. Hatcher was not valid and that, in fact, there was no workers' compensation policy in effect for Mr. Hatcher or the individuals engaged by Mr. Hatcher.

19. Brian King Roofing did not dispute the audit finding of the Audit conducted by Travelers and does not dispute the fact that no workers' compensation coverage was provided by Mr. Hatcher for the individuals during the time they were performing work on behalf of Brian King Roofing.

20. Brian King Roofing did not provide a copy of Mr. Hatcher's purported Certificate of Insurance to Hartford or Travelers until the document was reviewed in the course of the post-coverage period audit.

CONCLUSIONS OF LAW

1. In accordance with Tenn. Comp. R. & R. 1360-04-01-.02(3) and (7), the Petitioner, Brian King Roofing, bears the burden of proof in proving by a preponderance of the evidence that the facts alleged in the Petition are true and that the issues raised therein should be resolved in its favor.

2. Tenn. Code Ann. § 50-6-901 provides in pertinent part as follows:

50-6-901. Part definitions.

For purposes of this part, unless the context otherwise requires:

* * * *

- (5) "Construction services provider" or "provider" means any person or entity engaged in the construction industry;

* * * *

- (8) "Engaged in the construction industry" means any person or entity assigned to the contracting group as those classifications are designated by the rate service organization designated by the commissioner of commerce and insurance as provided in § 56-5-320; provided, that where more than one (1) classification applies, the governing classification, as that term is defined by the rate service organization designated by the commissioner of commerce and insurance as provided in § 56-5-320,² shall be used to determine whether the person or entity is engaged in the construction industry;

* * * *

- (10) "General contractor" means the person or entity responsible to the owner or developer for the supervision or performance of substantially all of the work, labor, and the furnishing of materials in furtherance of the construction, erection, remodeling, repair, improvement, alteration or demolition of a building, structure or other undertaking and who contracts directly with the owner or developer of the building, structure or other undertaking; "general contractor" includes a prime contractor;

3. Tenn. Code Ann. § 50-6-902 provides as follows:

50-6-902. Requirement that construction services providers carry workers' compensation insurance -- Exemptions -- Election by subcontractor.

- (a) Except as provided in subsection (b), all construction services providers shall be required to carry workers' compensation insurance on themselves. The requirement set out in this subsection (a) shall apply whether or not the provider employs fewer than five (5) employees.
- (b) To the extent there is no restriction on applying for an exemption pursuant to § 50-6-903, a construction services provider shall be exempt from subsection (a) if the provider:

² See *supra*, Note 1. Under the NCCI classification standards, roofing work of all types is designated by code 5551. http://www.tn.gov/insurance/documents/WC_TN_7_1_14_Contracting_Codes_List.pdf

- (1) Is a construction services provider rendering services on a construction project that is not a commercial construction project and is listed on the registry;
- (2) Is a construction services provider rendering services on a commercial construction project, is listed on the registry and such provider is rendering services to a person or entity that complies with § 50-6-914(b)(2);
- (3) Is covered under a policy of workers' compensation insurance maintained by the person or entity for whom the provider is providing services;
- (4) Is a construction services provider performing work directly for the owner of the property; provided, however that this subdivision (b)(4) shall not apply to a construction services provider who acts as a general or intermediate contractor and who subsequently subcontracts any of the work contracted to be performed on behalf of the owner;
- (5) Is a construction services provider building a dwelling or other structure, or performing maintenance, repairs, or making additions to structures, on the construction service provider's own property; or
- (6) Is a provider whose employment at the time of injury is casual as provided in § 50-6-106.

4. Tenn. Code Ann. § 50-6-914 provides in pertinent part as follows:

(a) Except as provided for in subsection (b), a general contractor, intermediate contractor or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the general contractor, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

(b)(1) Notwithstanding subsection (a) and subject to subdivision (b)(2), a general contractor, intermediate contractor or subcontractor shall not be liable for workers' compensation to a construction services provider listed on the registry established pursuant to this part.

* * * *

(e) This section applies only in cases where the injury occurred on, in, or about the premises on which the general contractor has undertaken to execute work or that are otherwise under the general contractor's control or management.

5. The Petitioner, Brian King Roofing, has failed to show by a preponderance of the evidence that it should not be responsible for the workers compensation coverage of the uninsured persons it engaged through Hatcher. Even though the Petitioner claims that it should be absolved of liability for the increased premium after it was presented a false certificate of coverage, they remain responsible for worker's compensation coverage of their subcontractors if those subcontractors fail to obtain their own coverage or file an exemption.

NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED**:

1. Raymond Hatcher, and the individuals engaged by him, should be considered employees of Brian King Roofing, Inc., by Hartford Underwriters Insurance Company in calculating applicable premium for the June 14, 2011 through June 14, 2012 policy period.

2. Brian King Roofing shall pay additional premium to Hartford Underwriters Insurance Company in the amount of forty four thousand eight hundred and fifteen dollars (\$44,815.00) for the June 14, 2011—June 14, 2012 policy period within sixty (60) days of this Order.

3. The costs of this matter shall be taxed against the Petitioner, Brian King Roofing, Inc.


Maliaka Bass
Commissioner's Designee

Filed in the Administrative Procedures Division, Office of the Secretary of State, this ____ day of July, 2014.

Richard Collier, Director
Administrative Procedures Division

NOTICE OF APPEAL PROCEDURES

Review of Final Order

This Final Order is issued pursuant to Tenn. Comp. R. & Regs. 0780-1-82-.10.

Any party who is aggrieved by this Final Order is entitled to judicial review pursuant to

Tenn. Code Ann. § 4-5-322. See Tenn. Comp. R. & Regs. 0780-1-82-.11.

Tenn. Code Ann. § 4-5-322 provides in relevant part:

(a)(1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review.

* * * * *

(b)(1)(A) Proceedings for review are instituted by filing a petition for review in the chancery court of Davidson County, unless another court is specified by statute. Such petition shall be filed within sixty (60) days after the entry of the agency's final order thereon.

* * * * *

(2) In a case in which a petition for judicial review is submitted within the sixty-day period but is filed with an inappropriate court, the case shall be transferred to the appropriate court. The time for filing a petition for review in a court as provided in this chapter shall not be extended because of the period of time allotted for filing with the agency a petition for reconsideration. Copies of the petition shall be served upon the agency and all parties of record, including the attorney general and reporter, in accordance with the provisions of the Tennessee Rules of Civil Procedure pertaining to service of process.

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the reviewing court, in a hearing that shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the court, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured and if no bond amount is sufficient, the stay shall be denied. The reviewing court shall not consider a stay unless notice has been given to the attorney general and reporter; nor shall the reviewing court consider a stay unless the petitioner has previously sought a stay from the agency or demonstrates that an agency ruling on a stay application cannot be obtained within a reasonable time.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the within and foregoing document has been sent by U.S. Mail, postage prepaid, to the following on this 15 day of July, 2014:

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